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No. 08-1028

In the

Supreme Court of the United States

Paul Messer & Dorothy Calabrese, M.D.
Petitioners,

v.

U.S. Department of Health and Human Services
Respondent.

Petition for a Writ of Certiorari
to the U.S. Court of Appeals
for the Ninth Circuit

PETITION FOR REHEARING FROM DENIAL OF CERTIORARI

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pro se

Question Presented

On 07-25-08 the District Court wrote: *"In Shalala v. Ill. Council on Long Term Care, Inc. the Supreme Court clarified and limited the holding of Michigan Academy, stating that it stands for the proposition that '§ 1395ii does not apply § 405(h) where application of § 405(h) would not simply channel review through the agency, but would mean no review at all.' Based on this narrow reading of Bowen, Plaintiffs can only escape the exhaustion requirement if they can demonstrate that completing the review process would mean no judicial review at all. Plaintiffs have failed to make this showing."* After we just formally exhausted the two cases before this Court in a "final agency decision," we are being denied judicial review pending complete additional exhaustion of any and all collateral cases, including a local coverage determination filed 10-31-07 (which has not even started yet) and appeal of any ongoing patient claims submissions.

QUESTION

When Due Process Clause violations including perjuries, obstructions of justice, false entries, false statements, and false documents cause irreparable harm to Medicare Part B patients, are formally presented to the agency, and a "final agency decision" denies any review, can judicial review be stayed pending exhaustion of collateral cases?

Intervening Circumstances

Subsequent to our Petition for Certiorari, after more than six years in administrative review, we received a "final agency decision." The Petition's Due Process violations had been properly presented to the agency and were denied any review at all by the Medicare Appeals Council.

Under the plain language of this Court in *Shalala v Illinois Council,* we've now formally exhausted these two constitutional cases and judicial review would proceed.

That is not what has happened because our Circuit's overly-constrained interpretation of exhaustion under *Shalala v Illinois Council* demands additional exhaustion of any and all collateral cases. This was confirmed again by the District Court on 03-24-09.

Our Circuit's overly-constrained exhaustion requirements are both unconstitutional and inconsistent with this Court. The impact is ongoing preventable premature morbidity and mortality of innocent Medicare Part B beneficiaries.

Other Substantial Grounds

This Court has consistently ruled that with respect to pro se filings:

a. "we hold [them] to less stringent standards than formal pleadings drafted by lawyers"

Haines v. Kerner, 404 U.S. 519, 520 (1972) citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) and

b. "pleadings shall be so construed as to do substantial justice." *Baldwin County Welcome Center v. Brown*, 466 US 147 (1984)

As pro se, we misunderstood this Court's focus and that we were not required to prove in the Petition that the Medical Board of California approved the care as medically necessary or that HHS Due Process Clause violations were valid, important and causing irreparable harm.

National Importance

Our Circuit's overly-constrained interpretation of exhaustion:

- provides an unintended shield of sovereign immunity for misconduct within the agency

- threatens orphan classes of Medicare patients for whom the judiciary is the only branch of government uniquely charged with protecting their rights because they will never have associations with attorney representation or political action committees

Conflict with Supreme Court Decisions

Our Circuit's overly-constrained exhaustion interpretation has decided an important federal question in a way that conflicts with three relevant decisions of this Court:

- *Shalala v. Illinois Council for Longterm Care, Inc.*
- *Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967) and
- *McCarthy v. Madigan,* 503 U.S. 140 (1992)

Conflict with 5th Amendment Due Process

Our Circuit's overly-constrained interpretation of exhaustion has decided an important federal question in a way that conflicts with the Due Process Clause of the Fifth Amendment.

Under *Willowbrook v. Olech,* 528 U.S. 562 (2000), we are a class-of-two. There is a larger class of thirty-six Medicare patients who signed on to participate in our administrative cases. We have not been treated the same as similarly-situated Medicare Part B physicians and patients having been subjected to perjuries, obstructions of justice, false entries, false statements, and false documents. There is no rational governmental basis for the difference in treatment. There is ill will.

Approval of a Majority of Justices

> There is a practical reason why we employ the presumption not only to questions of whether judicial review is available, but also to questions of when judicial review is available. Delayed review - that is, a requirement that a regulated entity disobey the regulation, suffer an enforcement proceeding by the agency, and only then seek judicial review - may mean no review at all. For when the costs of "presenting" a claim via the delayed review route exceed the costs of simply complying with the regulation, the regulated entity will buckle under and comply, even when the regulation is plainly invalid.
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> *Justice Clarence Thomas*
> *Shalala v. Illinois Council*

The four original dissenting Justices were Clarence Thomas, John Paul Stevens, Anthony Kennedy and Antonin Scalia. Three wrote strong dissenting opinions. This case presents injustice that greatly exceeds their well-considered concerns a decade ago.

Justice Stephen Breyer, wrote on behalf of the majority, which included Justices Ruth Bader

Ginsberg and David Souter. The majority written opinion, both in plain language and in their specific inclusions of exceptions such as *Abbott Laboratories v. Gardner* and *McCarthy v. Madigan,* is wholly inconsistent with our Circuit's interpretation of exhaustion. Justice Breyer's *Administrative Law and Regulatory Policy, Problems, Text, and Cases,* [Sixth Edition, Aspen] would have to have an entire section substantially rewritten if our Circuit's overly-constrained interpretation of exhaustion were to stand.

It is realistic to surmise that five or more Justices would never knowingly support our Circuit's overly-constrained interpretation of exhaustion.

Apellants

I, Paul Messer, am a Medicare Part B beneficiary severely adversely impacted in this matter.

I, Dorothy Calabrese, M.D., am a Medicare Part B physician who graduated from the Bronx H.S. of Science, NYU and the Columbia College of Physicians and Surgeons '76. I am a longstanding member in good standing of the American College of Allergy, Asthma and Immunology, the AMA, CMA, OCMA and the Association of American Physicians and Surgeons.

CONCLUSION

The Court should grant this Petition for Rehearing from Denial of Certiorari.

RULE 44.2 CERTIFICATION

We certify that the Petition for Rehearing from Denial of Certiorari is presented in good faith and not for delay and is restricted to the grounds specified in Supreme Court Rule 44.2.

We declare on this the 8th day of April in the City of Laguna Hills, CA that all the information in the Petition for Reharing is true and correct to the best of our knowledge under penalty of perjury.

Paul Messer

Dorothy Calabrese M. D.

Dorothy Calabrese, M.D.